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In the Supreme Court of the United States

DONALD SAUCIER,
Petitioner,
v.
ELLIOT M. KATZ AND IN DEFENSE OF ANIMALS,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE STATES OF TEXAS, ALABAMA, ALASKA, ARKANSAS, CALIFORNIA, COLORADO, CONNECTICUT, DELAWARE, ILLINOIS, LOUISIANA, MARYLAND, MASSACHUSETTS, MISSISSIPPI, MONTANA, NEBRASKA, NEW YORK, NORTH DAKOTA, OHIO, OKLAHOMA, OREGON, PENNSYLVANIA, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, UTAH, VERMONT, AND WASHINGTON AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Whether, in a case alleging the use of constitutionally excessive force, the test for qualified immunity and the reasonableness test under the Fourth Amendment are identical, such that a finding of unreasonable force under the Fourth Amendment necessarily precludes the officer from being entitled to qualified immunity.

2. Whether the court of appeals erred in concluding, based on the facts known to it "at this stage of the case," that petitioner's use of force in arresting respondent, which consisted of carrying respondent from the crowd to a waiting van and pushing him inside, without injuring him or placing him in any pain, so clearly exceeded the amount of force permitted by the Fourth Amendment as to warrant denial of qualified immunity.

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BRIEF OF THE STATES OF TEXAS, ALABAMA, ALASKA, ARKANSAS, CALIFORNIA, COLORADO, CONNECTICUT, DELAWARE, ILLINOIS, LOUISIANA, MARYLAND, MASSACHUSETTS, MISSISSIPPI, MONTANA, NEBRASKA, NEW YORK, NORTH DAKOTA, OHIO, OKLAHOMA, OREGON, PENNSYLVANIA, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, UTAH, VERMONT, AND WASHINGTON AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

This case asks whether qualified immunity remains an available defense to a claim of excessive use of force under the Fourth Amendment. The Ninth Circuit erroneously equated the merits inquiry (objectively reasonable force) with

the qualified immunity inquiry (objective legal reasonableness) and held that an officer who uses excessive force necessarily forfeits qualified immunity as a matter of law. *Katz v. United States*, 194 F.3d 962 (CA9 1999). Because such reasoning cannot be squared with this Court's qualified immunity jurisprudence, *amici* urge the Court to reverse the judgment of the Ninth Circuit.

INTEREST OF *AMICI*

The States of Texas, Alabama, Alaska, Arkansas, California, Colorado, Connecticut, Delaware, Illinois, Louisiana, Maryland, Massachusetts, Mississippi, Montana, Nebraska, New York, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Utah, Vermont, and Washington appear as *amici curiae* in support of Petitioner. *See* SUP. CT. R. 37.4.

Amici have an interest in this case because it directly impacts state law enforcement. Certainly, *amici* do not condone the use of excessive force by peace officers in the course of performing their duties. *Amici* recognize, however, that an officer whose conduct is later determined by a court to violate the Fourth Amendment may have acted under a reasonably mistaken belief that his or her conduct was permissible in light of clearly established law. In such cases, qualified immunity is a vital shield against both suit and liability for a Fourth Amendment violation.

If the Court were to abrogate or limit the qualified immunity defense in the context of excessive force cases, peace officers would be subject to the burdens of full-blown discovery and trial notwithstanding the objective reasonableness of their conduct in light of clearly established

law. This would unduly disrupt state law enforcement efforts and compromise public safety, because officers would spend more time in court and less time preserving the peace. Eliminating qualified immunity as a defense to excessive force claims could also impede recruitment efforts, as the increased threat of personal liability might deter candidates from public service. Such a dramatic departure from qualified immunity jurisprudence is not warranted, and *amici* urge the Court to reverse the judgment of the Ninth Circuit.

SUMMARY OF ARGUMENT

In *Anderson v. Creighton*, 483 U.S. 635 (1987), the Court held that qualified immunity is an available defense to a violation of the Fourth Amendment. *Anderson* explicitly rejected the argument that conduct that violates the Fourth Amendment's "reasonableness" standard—for example, an unreasonable search or unreasonable seizure—necessarily is "unreasonable" for purposes of qualified immunity as well. *See id.*, at 643-44. Declining to carve out a Fourth Amendment exception to qualified immunity, the Court observed that "it is inevitable that law enforcement officials will in some cases reasonably but mistakenly conclude that probable cause is present, and we have indicated that in such cases those officials—like other officials who act in ways they reasonably believe to be lawful—should not be held personally liable." *Id.*, at 641. Furthermore, the Court acknowledged that *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), "clearly expressed the understanding that the general principle of qualified immunity it established would be applied 'across the board.'" *Anderson*, 483 U.S., at 645.

For purposes of qualified immunity, there is no principled distinction between unreasonable force and other types of unreasonable conduct in violation of the Fourth Amendment. *Anderson* provides the answer: just as there is no inherent conflict between an unreasonable search or seizure and qualified immunity, there is no inherent conflict between excessive force and qualified immunity. *See* 483 U.S., at 643-44.

The excessive force standard established in *Graham v. Connor*, 490 U.S. 386 (1989), was never intended to encapsulate the protections of qualified immunity. *Graham* does not reference clearly established law or *Harlow*'s notion of objective legal reasonableness—*i.e.*, a reasonable, albeit mistaken, belief that conduct does not violate clearly established rights of which a reasonable officer would have known. Nor was *Graham* designed to strike the policy compromise that underlies the doctrine of qualified immunity—namely the need to balance vindication of civil rights abuses with preservation of government stability and promotion of public service through expedient resolution of insubstantial constitutional claims. Finally, *Graham* provides officers none of the procedural protections that accompany qualified immunity, including the right to interlocutorily appeal a district court's erroneous rulings on abstract issues of law concerning the defense. If excessive force cases are to be governed solely by *Graham*, without reference to qualified immunity or its attendant protections, then officers routinely will be subjected to the burdens of discovery and trial. That result would be inconsistent with *Harlow* and its progeny, and it would squarely conflict with *Anderson*.

Because all public servants, including police officers, are entitled to invoke qualified immunity when they perform discretionary functions in a manner that is objectively reasonable, the Court should reconfirm the core protections of *Harlow* and reject the Ninth Circuit's conclusion that an officer who uses excessive force forfeits qualified immunity as a matter of law.

ARGUMENT

I. A FINDING OF EXCESSIVE FORCE DOES NOT NECESSARILY PRECLUDE, AND IS NOT INHERENTLY IRRECONCILABLE WITH, QUALIFIED IMMUNITY.

The Ninth Circuit erroneously concluded that "the defense of qualified immunity in a claim of excessive force under the Fourth Amendment is the same as the reasonableness inquiry on the merits of such a claim." *Katz*, 194 F.3d, at 970-71. The court's determination that fact issues as to excessive force required denial of qualified immunity reflects a fundamental misunderstanding of the doctrine. The purpose of qualified immunity is to protect officers who commit constitutional violations, provided the challenged conduct could have appeared objectively reasonable in light of clearly established law. *See, e.g., Harlow*, 457 U.S., at 818-19. If qualified immunity required the absence of a violation, the defense would serve no purpose.

Unreasonable conduct in violation of the Fourth Amendment is no exception to the rule. To the contrary, the Court has consistently applied qualified immunity in a variety of Fourth Amendment contexts. *See, e.g., Wilson v. Layne*, 526 U.S. 603, 614-15 (1999) (media ride-along during home search); *Anderson*, 483 U.S., at 641 (warrantless home entry);

Malley v. Briggs, 475 U.S. 335, 344-45 (1986) (warrant affidavit unsupported by probable cause); *Mitchell v. Forsyth*, 472 U.S. 511, 534 (1985) (illegal wiretap). Carving a new excessive force exception out of the defense would defeat qualified immunity's delicate balance between promoting civil rights and protecting public servants whose objectively reasonable mistakes result in constitutional violations.

A. Qualified Immunity Reflects an Important Policy-Driven Compromise.

The touchstone for qualified immunity is "objective legal reasonableness." *Harlow*, 457 U.S., at 819. "[G]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.*, at 818. *Harlow*'s "objective legal reasonableness" standard reflects an attempt to accommodate competing policy goals: a desire, on the one hand, to redress civil rights abuses, and a need, on the other hand, to promote government service and minimize government disruption through the expedient resolution of insubstantial civil rights claims. Qualified immunity is an imperfect, often paradoxical creature of compromise, but it strikes the best "balance between the evils inevitable in an available alternative." *Id.*, at 813.

At the heart of qualified immunity is a recognition that government officials who make mistakes and commit constitutional violations do not necessarily forfeit qualified immunity. Instead, a defendant retains qualified immunity, notwithstanding a constitutional violation, provided an official

in the defendant's position reasonably, albeit mistakenly, could have believed the conduct in question was lawful. *See id.*, at 818-19. In other words, a defendant's *reasonably* mistaken understanding of the law does not preclude qualified immunity.

B. Excessive Force Is Indistinguishable from Other Types of Unreasonable Conduct for Which Qualified Immunity Is an Available Defense.

In *Graham v. Connor*, the Court considered which standard to apply to excessive force claims arising out of an arrest, investigatory stop, or other seizure. The Court observed that excessive force claims typically would arise under either the Eighth Amendment (in the context of incarceration) or the Fourth Amendment (in the context of an unreasonable seizure). *See id.*, at 394.[1] *Graham* emphasized that the validity of a claim "must then be judged by reference to the *specific constitutional standard* which governs that right, rather than to some generalized 'excessive force' standard." *Id.* (emphasis added). For purposes of allegations of excessive force arising from an arrest, investigatory stop, or other seizure, the Court concluded that those claims "should be analyzed under the Fourth Amendment and its 'reasonableness' standard." *Id.*, at 395. *Graham* drew no distinction, under the Fourth Amendment's reasonableness standard, between a subset of Fourth Amendment claims involving excessive force and a subset of Fourth Amendment

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1. When an individual is neither incarcerated nor seized, a claim may also arise under the Fourteenth Amendment's substantive due process ("shocking to the conscience") standard. *See County of Sacramento v. Lewis*, 523 U.S. 833, 843-44, 846 (1998).

claims involving otherwise unreasonable seizures or unreasonable searches. Instead, the "specific constitutional standard which governs [the] right" to be free of excessive force was deemed to be the general Fourth Amendment standard of reasonableness.

Within the context of Fourth Amendment reasonableness, the Court has long recognized the availability of qualified immunity with respect to claims alleging unreasonable searches in violation of the Fourth Amendment. *See, e.g.*, *Wilson*, 526 U.S., at 614-15; *Anderson*, 483 U.S., at 641; *Malley*, 475 U.S., at 344-45; *Mitchell*, 472 U.S., at 534. In *Anderson*, the Court expressly rejected the argument that "unreasonable" conduct in violation of the Fourth Amendment can never be deemed "reasonable" for purposes of qualified immunity.

> "The short answer to this argument is that it is foreclosed by the fact that we have previously extended qualified immunity to officials who were alleged to have violated the Fourth Amendment. *See Malley, supra* (police officers alleged to have caused an unconstitutional arrest); *Mitchell v. Forsyth*, 472 U.S. 511, 105 S. Ct. 2806, 86 L. Ed.2d 411 (1985) (officials alleged to have conducted warrantless wiretaps). Even if that were not so, however, we would still find the argument unpersuasive. Its surface appeal is attributable to the circumstance that the Fourth Amendment's guarantees have been expressed in terms of 'unreasonable' searches and seizures. Had an equally serviceable term such as 'undue' searches and seizures been employed, what might be termed the 'reasonably unreasonable' argument against

> application of *Harlow* to the Fourth Amendment would not be available—just as it *would* be available against application of *Harlow* to the Fifth Amendment if the term 'reasonable process of law' had been employed there." *Anderson*, 483 U.S., at 644.

As *Anderson* recognized, the "reasonably unreasonable" argument stemmed from linguistic coincidence, rather than a substantive alignment between qualified immunity and the reasonableness standard governing all Fourth Amendment claims.

The same overarching Fourth Amendment reasonableness standard governs searches, seizures, and uses of force. *See Graham*, 490 U.S., at 394-95. Consequently, the same reasoning employed by the Court in *Anderson* applies in the context of excessive force. *Anderson*'s acknowledgment that it is possible for officers to conduct "reasonably unreasonable" searches and seizures compels the corollary conclusion that it is possible for officers to use reasonably unreasonable force. If an officer who violates the Fourth Amendment and conducts an unreasonable search does not necessarily forfeit qualified immunity, neither should an officer who uses unreasonable force.

There is nothing about the legal standard governing searches and seizures—*i.e.*, probable cause—that renders it more susceptible to error than the legal standard governing excessive force. The contours of probable cause undoubtedly are fuzzy. *See Anderson*, 483 U.S., at 644 ("We have frequently observed, and our many cases on the point amply demonstrate, the difficulty of determining whether particular searches or seizures comport with the Fourth Amendment.").

But, under *Graham*, the contours of reasonable force are not any clearer.

Graham adopted a "totality of the circumstances" approach that, like other Fourth Amendment reasonableness standards, "is not capable of precise definition or mechanical application." *Graham*, 490 U.S., at 396 (citations omitted). An officer, in the midst of "circumstances that are tense, uncertain, and rapidly evolving," should consider such factors as "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight" before deciding what force is required under the circumstances. *Id.*, at 396-97. Certainly, *Graham*'s balancing test creates considerable flexibility; but with that flexibility necessarily come gray areas of law.

The *Graham* factors do not comprise a bright-line test with easy answers. It is inevitable that, under certain circumstances, reasonable officers will disagree about the necessity of a particular use of force. Qualified immunity is designed to protect officers who, in struggling with the fuzzy contours of Fourth Amendment "reasonableness," reasonably miscalculate the parameters of lawful conduct. *See Malley*, 475 U.S., at 341 ("[I]f officers of reasonable competence could disagree on this issue, immunity should be recognized.").

The Court has already held, with respect to probable cause, that "[l]aw enforcement officers whose judgments in making these difficult determinations are objectively legally reasonable should no more be held personally liable in damages than should officials making analogous

determinations in other areas of law." *Anderson,* 483 U.S., at 644. For purposes of excessive force, too, there is no reason to exclude peace officers from the immunity protections afforded public servants in all other constitutional contexts.[2]

Reasonable mistakes that cause unreasonable searches are analytically indistinguishable from reasonable mistakes that cause unreasonable uses of force. The Court embraced the seeming paradox of reasonably unreasonable conduct in *Anderson*, and no departure is warranted simply because the unreasonable conduct at issue is unreasonable force rather

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2. The Second Circuit has suggested that qualified immunity and excessive force may overlap in a manner in which qualified immunity and probable cause do not. *See Finnegan v. Fountain*, 915 F.2d 817, 824 n.11 (CA2 1990) (postulating that excessive force, like qualified immunity, evaluates the reasonableness of an officer's conduct *ex ante*, whereas probable cause evaluates the reasonableness of an officer's conduct *ex post*). However, *Finnegan* expressly acknowledged that its *ex ante/ex post* distinction was derived from Second Circuit law and *not* from anything the Court said in *Anderson*. *Id.* (recognizing that *Anderson* "did not explain how the two standards of reasonableness under the claim and the defense differ from each other," but citing a Second Circuit case that suggests an explanation via an *ex ante/ex post* distinction).

Nothing in *Anderson* supports the conclusion that excessive force should be treated differently than other Fourth Amendment violations for purposes of qualified immunity. Furthermore, language in *Graham* belies any notion of an *ex post/ex ante* dividing line between Fourth Amendment claims. *See* 490 U.S., at 396 (referring to excessive force as being governed by "the *same* standard of reasonableness *at the moment*" as are arrests and searches) (citing *Maryland v. Garrison*, 480 U.S. 79 (1987); *Hill v. California*, 401 U.S. 797 (1971)) (emphasis added).

than an otherwise unreasonable seizure or an unreasonable search.

C. The Standards Governing Qualified Immunity and Excessive Force Are Not Coextensive.

Although the benchmarks for determining qualified immunity (objective legal reasonableness) and excessive force (objectively reasonable force) sound alike, the two inquiries are not identical. The *Graham* inquiry focuses on "whether the officers' actions *are* 'objectively reasonable' in light of the facts and circumstances confronting them." 490 U.S., at 397 (emphasis added). By contrast, the qualified immunity inquiry focuses on whether an objectively reasonable officer, in light of the facts and circumstances confronting the officer could have reasonably, albeit mistakenly, believed the use of force would not violate clearly established rights. *See, e.g., Wilson*, 526 U.S., at 614-15; *Anderson*, 483 U.S. at, 641.

In other words, the merits-based excessive force inquiry asks whether the use of force *was* objectively reasonable under the circumstances, whereas the qualified immunity inquiry asks whether the use of force *could have appeared* objectively reasonable under both the circumstances and the law as clearly established at the time the action occurred. *See Harlow*, 457 U.S., at 818.

Language in *Graham* supports the notion that the inquiries for qualified immunity and excessive force, though closely aligned, are not coextensive. Qualified immunity was not at issue in *Graham*; however, an explicit reference to the doctrine appears in a footnote:

> "[T]he officer's *objective* 'good faith'—that is, whether he could reasonably have believed that the force used did not violate the Fourth Amendment—may be relevant to the availability of the qualified immunity defense to monetary liability under §1983. *See Anderson v. Creighton*, 483 U.S. 635, 107 S. Ct. 3034, 97 L. Ed.2d 523 (1987). Since no claim of qualified immunity has been raised in this case, however, we express no view on its proper application in excessive force cases that arise under the Fourth Amendment." 490 U.S., at 399 n.12.

Footnote 12 contains the crucial acknowledgment that an officer's objective "good faith" for purposes of qualified immunity is an inquiry dependent on "whether he *could* reasonably have believed that the force used did not violate the Fourth Amendment." *Id.* (emphasis added). The suggestion that the "could" standard might present a basis for awarding qualified immunity in the context of an excessive force claim implicitly recognizes a distinction between the merits inquiry and the qualified immunity defense. Tellingly, the Court did not ponder whether qualified immunity was coextensive with excessive force; instead, the question left open in footnote 12 was what the "proper application" of qualified immunity would be. In other words, the Court did not ask whether, but how, qualified immunity should apply in excessive force cases.

Amici believe that the proper application of qualified immunity as a defense against an excessive force claim should be the same as the application of the defense in any other context governed by the Fourth Amendment and its "reasonableness" standard. Irrespective of whether a use of

force *was*, in fact, reasonable—*i.e.*, notwithstanding the possibility that a constitutional violation in fact occurred—if an objectively reasonable officer presented with the facts and circumstances *could have believed* that the force used would not violate clearly established rights of which a reasonable officer would have known, then the officer is entitled to qualified immunity.

This case illustrates precisely the type of circumstances in which qualified immunity should apply. Elliot Katz alleges that Officer Saucier used excessive force while placing Katz in a van during an arrest for protest activity. The use of force at issue is, essentially, a shove; and Katz does not claim to have been injured or suffered any pain from this incident. *See* 194 F.3d, at 955; Pet. at (i), 3.

Despite the minimal force employed, the Ninth Circuit determined that a reasonable officer could deem such force excessive under the circumstances. 194 F.3d at 970. *Amici* disagree with the Ninth Circuit's conclusion that Officer Saucier's conduct was not reasonable, *per se*, under the Fourth Amendment.[3] In any event, the court of appeals erred in perfunctorily denying qualified immunity without careful consideration of clearly established law. The Court "has long recognized that the right to make an arrest carries with it the right to use some degree of physical coercion or threat thereof

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3. *Amici* focus this brief on the first question presented but also fully support Petitioner Saucier on the second question presented—*i.e.*, whether "carrying respondent from the crowd to a waiting van and pushing him inside, without injuring him or placing him in any pain, so clearly exceeded the amount of force permitted by the Fourth Amendment as to warrant denial of qualified immunity."

to effect it." *Graham*, 490 U.S., at 396. Given *Graham*'s recognition that "'[n]ot every push or shove' . . . violates the Fourth Amendment," *id.*, an officer in Petitioner Saucier's position reasonably could have believed that carrying Katz away from the crowd and pushing him into a van would not violate his Fourth Amendment rights.

To deprive Officer Saucier of qualified immunity under these circumstances would write clearly established law out of the analysis. Morever, it would mark a dramatic departure from this Court's consistent application of the defense in cases in which Fourth Amendment violations are determined to have occurred, but the Fourth Amendment principles at issue were not clearly established. *See, e.g., Wilson*, 526 U.S., at 614-15 ("Since the police action in this case violated the petitioner's Fourth Amendment right, we must now decide whether this right was clearly established at the time of the search."); *Mitchell*, 472 U.S., at 534 ("The decisive fact is not that Mitchell's position turned out to be incorrect, but that the question was open at the time he acted.").[4]

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4. The Ninth Circuit viewed the only relevant clearly established law as *Graham*'s overarching reasonableness test. *Katz*, 194 F.3d, at 969-70. Since *Graham's* standard was clearly established when Officer Saucier acted, the court of appeals assumed that application of *Graham* to the specific circumstances confronting Saucier was solely a question of "reasonableness" under the Fourth Amendment. *Id.* The Court, however, has repeatedly admonished that the Fourth Amendment's generic reasonableness standard does not adequately define qualified immunity's "objective legal reasonableness" test. *See Wilson*, 526 U.S., at 614-15; *Anderson*, 483 U.S., at 639-40. Instead, the "*contours* of the right must be sufficiently clear that a reasonable official would understand that what *he is doing* violates that right." *Anderson*, 483 U.S.,

Unlike qualified immunity, which inquires into the status of the law "at the time an action occurred," *Harlow*, 457 U.S., at 818, *Graham*'s excessive force test does not include clearly established law as a factor in its "totality of the circumstances" analysis. This unique aspect of qualified immunity is crucial, because officers are not legal scholars and "cannot [be] 'expected to predict the future course of constitutional law'" with respect to Fourth Amendment rules that have not been clearly established by this Court, the governing federal circuit in an officer's jurisdiction, or a consensus of cases of persuasive authority. *Wilson*, 526 U.S., at 617-18.

Although *Graham*'s multi-factor excessive force standard permits a substantial degree of latitude and discretion, it does not afford the same protections as qualified immunity. There is no comparable allowance for reasonably mistaken beliefs about the constitutionality of an officer's conduct. Although *Graham* analyzes the reasonableness of force from the perspective of "a reasonable officer on the scene, rather than with the 20/20 vision of hindsight," the focus remains on the "amount of force that *is* necessary in a particular situation."

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at 640 (emphasis added); *see also Wilson*, 526 U.S., at 615 ("In this case, the appropriate question is the objective inquiry of whether a reasonable officer could have believed that *bringing members of the media into a home during the execution of a warrant* was lawful, in light of clearly established law and all the information the officers possessed.") (emphasis added). By limiting qualified immunity to only those cases where the overarching constitutional standard is not clearly defined, the Ninth Circuit's approach precludes application of the defense to any excessive force claim, since *Graham*'s reasonableness test has been clearly established since 1989.

490 U.S., at 396-97 (emphasis added). Qualified immunity, by contrast, focuses on the amount of force that reasonably, albeit mistakenly, *could have been perceived* as constitutionally permissible in light of a particular situation *and* the law as clearly established at the time.

It is logical that an analytical gap should exist between qualified immunity and excessive force, because the two standards serve different purposes. *Graham* defines the circumstances under which liability for a excessive force constitutional violation will arise. Qualified immunity, by contrast, defines the circumstances under which liability for a constitutional violation will be *excused*—namely, circumstances where the law is not clearly established at the time, or where an officer reasonably, albeit mistakenly, could believe his conduct did not violate constitutional rights of which a reasonable officer would have known.

Of course, in many instances an unreasonable use of force will also constitute objectively unreasonable conduct for purposes of qualified immunity. That is, as a practical matter, the inquiries may yield the same result. But that possibility does not justify a *per se* preclusion of the defense in all excessive force cases. Any attempt to carve out a categorical exception would be inconsistent with qualified immunity, which is premised on a fluid notion of objective legal reasonableness requiring consideration of the specific circumstances with which each officer is confronted and a flexible analysis of the officer's response under both those context-specific circumstances and clearly established law. *See, e.g.*, *Wilson*, 526 U.S., at 614-15; *Anderson*, 483 U.S., at 641. There is no principled reason to exclude peace officers alleged to have used excessive force from the immunity

protections afforded officers in all other constitutional contexts

II. Equating the Inquiries for Qualified Immunity and Excessive Force Could Cause Officers to Forfeit Their Right to an Interlocutory Appeal and Routinely Subject Them to Full-Blown Discovery and Trials.

Qualified immunity is "*an immunity from suit* rather than a mere defense to liability." *Mitchell*, 472 U.S., at 526. Because qualified immunity is designed to protect public officials from the burdens and disruptions of discovery and trial, "a district court's rejection of a defendant's qualified-immunity defense is a 'final decision' subject to immediate appeal under the general appellate jurisdiction statute." *Behrens v. Pelletier*, 516 U.S. 299, 301 (1996).

On appeal, reviewing courts are limited to resolving disputes over an "'abstract issu[e] of law' relating to qualified immunity." *Id.*, at 313. Thus, appellate courts may decide, *de novo*, "whether the federal right allegedly infringed was 'clearly established.'" *Id.* Similarly, appellate courts may determine whether "all the conduct which the District Court deemed sufficiently supported for purposes of summary judgment met the *Harlow* standard of 'objective legal reasonableness.'" *Id.* Mere fact disputes over "whether the evidence could support a finding that particular conduct occurred," however, fall beyond the jurisdictional ambit of an interlocutory appeal. *Id.*

If the Court holds that the qualified immunity and excessive force inquiries are coextensive, officers could forfeit their opportunity to interlocutorily challenge a district court's

erroneous legal conclusion about qualified immunity. A denial of qualified immunity arguably would no longer constitute a "final decision" subject to immediate appeal because it would not be a collateral order distinct from the merits. *See id.*, at 305 (observing that interlocutory appeals are reserved for "a 'small class' of district court decisions that, though short of final judgment, are immediately appealable because they 'finally determine claims of right separable from, and collateral to, rights asserted in the action'") (quoting *Cohen v. Beneficial Ind. Loan Corp.*, 337 U.S. 541, 546 (1949)). If the inquiries into excessive force and qualified immunity are to become coextensive, trial on the merits would have to proceed in every case. *See id.* (noting that courts of appeal lack appellate jurisdiction over "decisions that are subject to revision, and even of 'fully consummated decisions [that] are but steps towards final judgment in which they will merge'") (quoting *Cohen*, 337 U.S., at 546). No redress for a legal misstep by the district court would be available until after an officer withstood full-blown discovery and the "unwarranted demands customarily imposed upon those defending a long drawn-out lawsuit." *Siegert v. Gilley*, 500 U.S. 226, 232 (1991). The policy-driven compromise inherent in qualified immunity would be lost.[5]

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5. If qualified immunity is unavailable in the context of excessive force claims, district courts will be stripped of opportunities to expediently weed out insubstantial civil rights claims at an early stage of the proceedings (for example, by granting a motion to dismiss on the basis of qualified immunity, pursuant to Federal Rule of Civil Procedure 12(b)(6), or by ordering a reply to an answer asserting a qualified immunity defense, pursuant to Federal Rule of Civil Procedure 7(a)). *See Crawford-El v. Britton*, 523 U.S. 574, 598 (1998). *Behrens* made clear

There is no meaningful reason to eliminate the procedural protections that flow from qualified immunity whenever an officer is sued for excessive force as opposed to other unreasonable conduct in violation of the Fourth Amendment. However, such would be the consequence of a holding that qualified immunity is coextensive with the merits inquiry into an excessive force claim.

III. The Court Should Reaffirm the Enduring Importance of the "Reasonable Mistake" in Qualified Immunity Jurisprudence.

It is possible for an officer to violate the Constitution, but to do so under a reasonably mistaken belief that his conduct is lawful. When that happens, the officer is entitled to qualified immunity. This reflects the Court's longstanding recognition that qualified immunity "gives ample room for mistaken judgments" and "provides ample protection to all but the plainly incompetent or those who knowingly violate the law." *Malley,* 475 U.S., at 341, 343.

The "reasonable mistake" is one of the core tenets of qualified immunity jurisprudence. In fact, were this Court to prohibit or limit the applicability of qualified immunity and the "reasonable mistake" with respect to excessive force claims, that philosophical departure would have ripple effects beyond the excessive force context. If officers who make

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that a rejection of the qualified immunity defense, even at the pleadings stage, is a "final decision" subject to interlocutory appeal. 516 U.S., at 307. Absent an available qualified immunity defense, however, early procedural protections against unwarranted and disruptive pretrial litigation, including discovery, disappear.

reasonable, albeit mistaken, judgments about the necessity of force can be categorically excluded from the ambit of qualified immunity, other public employees exercising discretionary functions might fear that their immunity protections could be forfeited next. This could dissuade individuals from taking government jobs. Public servants should not have to worry that courts might make policy-based distinctions about which types of duties should be afforded immunity protections, and which should not.

To transform qualified immunity into a guessing game would defeat the purpose of the doctrine. *Harlow*'s objective legal reasonableness test was designed to strike a balance between the need to vindicate civil rights abuses and the need to promote public service and shield government officials from insubstantial civil rights claims. It is inevitable that public servants will err; and when they do, they should be secure in knowing that their errors will not subject them to liability, or suit, provided they err in a manner that is objectively reasonable. *Harlow*'s compromise may be imperfect, but it should be preserved, as it strikes the best "balance between the evils inevitable in an available alternative." *See Harlow*, 457 U.S., at 813.

The notion of "reasonably unreasonable" force is no more paradoxical than the notion of reasonably unreasonable searches and seizures embraced by the Court in *Anderson v. Creighton*. Indeed, in deciding this case, the Court need look no further than *Anderson*: "As we noted before, *Harlow* clearly expressed the understanding that the general principle of qualified immunity it established would be applied '*across the board.*'" 483 U.S. at 645 (emphasis added). Excessive force cases are no exception to the rule. The Court should

reaffirm the vitality of qualified immunity as an available defense to all public servants in all constitutional contexts, including the excessive force context.

CONCLUSION

For these reasons, the Ninth Circuit's judgment should be reversed.

Respectfully submitted,

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